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The Fourth Amendment Warrant Requirement: Constitutional Protection of Legal Fiction - Noted Exceptions Recognized by the Tenth Circuit

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THE FOURTH AMENDMENT WARRANT REQUIREMENT: CONSTITUTIONAL PROTECTION OR LEGAL FICTION? NOTED EXCEPTIONS RECOGNIZED BY THE TENTH CIRCUIT

INTRODUCTION

Under the Fourth Amendment,[1] a search occurs when the government seeks to intrude into an area in which a person has manifested a subjective expectation of privacy that is recognized by society as being reasonable.[2] In authorizing the government to conduct a search, the Supreme Court has noted a strong preference for the issuance of warrants.[3] "Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions."[4] Yet, if one were to look across the landscape of Fourth Amendment law, this statement from the country's highest court would seem to be fatally flawed.[5] For as Justice Scalia observed in *California v. Acevedo*,[6] the Fourth Amendment warrant requirement has become "so riddled with exceptions that it [i]s basically unrecognizable."[7] However, as stretched and maligned as the Fourth Amendment may be,[8] it is the one protection that we, as citizens, have against governmental intrusion into what we "seek[] to preserve as private."[9]

This survey addresses cases decided by the United States Court of Appeals for the Tenth Circuit from September 2000 to August 2001,

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1. The Fourth Amendment provides:
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

2. Katz v. United States, 389 U.S. 347, 361 (1967)(Harlan, J., concurring).

3. 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.1, at 396 (3d ed. 1996).

4. *Katz*, 389 U.S. at 357.

5. *See* Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 512 (1991)("Over about the last twenty years, the warrant has evolved from being an absolute prerequisite of police intrusions upon persons and their possessions and to the use of the fruits of any search or arrest, to a procedural requirement sometimes acknowledged and rarely enforced." (internal citations omitted)).

6. 500 U.S. 565 (1991).

7. *Acevedo*, 500 U.S. at 582 (Scalia, J., concurring).

8. *See id.* (noting that one commentator had catalogued some twenty exceptions to the warrant requirement, including: "searches incident to arrest . . . automobile searches . . . border searches . . . administrative searches of regulated businesses . . . exigent circumstances . . . search[es] incident to nonarrest when there is probable cause . . . boat boarding for document checks . . . welfare searches . . . inventory searches . . . airport searches . . . school search[es] . . . ." (quoting Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985))).

9. *Katz*, 389 U.S. at 351.

which deal with exceptions the Tenth Circuit has recognized in allowing searches to take place without a search warrant based on probable cause. Part I analyzes the validity of consensual searches when they are preceded by a Fourth Amendment violation. Part II discusses the ability of law enforcement officials to execute searches of homes based on arrest warrants. Part III addresses administrative searches related to a regulated industry, specifically, motor carriers. Finally, Part IV focuses on the ability of secondary schools to conduct suspicionless searches of students.

I. CONSENSUAL SEARCHES PRECEDED BY FOURTH AMENDMENT VIOLATIONS

A. *Background*

One of the most well-established and utilized exceptions to the warrant and probable cause requirements of the Fourth Amendment is a search based on the individual's consent.[10] There are several reasons for this occurrence, including: administrative convenience of the police,[11] the ability of the police to search when there is no probable cause,[12] and the perception of the individual to be searched that consenting will allow him to clear his name and get about his business.[13] In some cases, consent to search is even sufficient to overcome a preceding illegal search or seizure conducted by the police.[14] While "evidence derived from the exploitation of an illegal search or seizure must be suppressed" as "fruit of the poisonous tree,"[15] if the government can establish that "the evidence to which instant objection is made has been come at . . . by means sufficiently distinguishable to be purged of the primary taint,"[16] it can "refute the inference that the evidence was a product of the constitutional violation."[17]

In a case that presents a valid search or seizure by the police, and thus no initial Fourth Amendment violation, courts will review the "totality of the circumstances" to determine whether the subsequent consent was voluntary, and not "the product of duress or coercion."[18] However,

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10. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

11. 3 LAFAVE, *supra* note 3, § 8.1, at 596.

12. *Id.* at 597.

13. *See id.*

14. *See* United States v. McGill, 125 F.3d 642, 644 (8th Cir. 1997)(concluding consensual search of vehicle proceeding illegal search was valid); United States v. Ramos, 42 F.3d 1160, 1164 (8th Cir. 1994) (concluding consensual search of vehicle following illegal stop was valid); United States v. Mendoza-Salgado, 964 F.2d 993, 1013 (10th Cir. 1992)(concluding consensual search of home following warrantless entry was valid).

15. United States v. Miller, 146 F.3d 274, 279 (5th Cir. 1998).

16. United States v. Lowe, 999 F.2d 448, 451 (10th Cir. 1993)(quoting Wong Sun v. United States, 371 U.S. 471, 488 (1963)).

17. *Miller*, 146 F.3d at 279.

18. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

when the initial search or seizure violates the Constitution, the burden on the government is heightened,[19] and the government must demonstrate that the consent was "sufficiently an act of free will to purge the primary taint of the unlawful invasion."[20] The Tenth Circuit has held that the factors enunciated by the Supreme Court in *Brown v. Illinois*,[21] are especially important in determining if consent preceding a Fourth Amendment violation is "sufficiently voluntary to purge the primary taint" of the illegal search or seizure.[22] "Among the factors which warrant consideration are '[t]he temporal proximity of the [Fourth Amendment violation] and the [consent], the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct.'"[23] In *United States v. Caro*,[24] the Tenth Circuit reviewed the admissibility of evidence discovered during a consensual search of a vehicle based on a stop that was unconstitutional in its scope.[25]

B. *United States v. Caro*

1. Facts

Utah Highway Patrol Trooper Denis Avery pulled over Caro after he noticed that the windows of the car Caro was driving appeared to be darker than the law of Utah permitted.[26] After Trooper Avery asked Caro for his license and registration, he noticed that the license was from Iowa and in Caro's name, while the registration was from Nebraska and in another person's name.[27] Caro appeared shaky and nervous, and told Trooper Avery that the car belonged to his friend, but was unable to recall his friend's last name.[28] A subsequent check revealed that the license was valid and that the car was not stolen; however, the car color was different than the color listed on the registration.[29] Caro's nervous behavior, his inability to remember the car owner's name, and the color discrepancy led Trooper Avery to suspect that the car was stolen.[30]

Trooper Avery next sought to compare the Vehicle Identification Number ("VIN") listed on the registration to the VIN plate visible through the windshield on the car's dashboard.[31] After Trooper Avery determined that the two matched, he asked Caro if he would exit the ve-

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19. *Miller*, 146 F.3d at 279.
20. *Wong Sun*, 371 U.S. at 486.
21. 422 U.S. 590 (1975).
22. United States v. Mendoza-Salgado, 964 F.2d 993, 1011 (10th Cir. 1992).
23. *Mendoza-Salgado*, 964 F.2d at 1011 (quoting *Brown*, 422 U.S. at 603-04).
24. 248 F.3d 1240 (10th Cir. 2001).
25. *Caro*, 248 F.3d at 1248.
26. *Id.* at 1242.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Caro*, 248 F.3d at 1243.

hicle so that he could also compare the VIN on the driver's door.[32] Caro complied, but Trooper Avery was unable to find a VIN on the driver's door.[33] However, while searching for the VIN plate on the door, Trooper Avery noticed air fresheners hanging in the car, as well as a bottle of air freshener.[34] This discovery made Trooper Avery suspicious that drugs might be in the car, which led him to ask Caro if any drugs were present.[35] After Caro responded in the negative, Trooper Avery asked for Caro's consent to search the car, which was subsequently given.[36]

Trooper Avery did not return Caro's license and registration until Caro opened both the trunk and hood of the car.[37] After an inspection of the trunk, Trooper Avery looked under the hood of the car.[38] Trooper Avery noticed that the battery appeared oversized, and upon further inspection, found two packages containing methamphetamine.[39]

The district court denied Caro's motion to suppress the drug evidence.[40] The court stated, "from the totality of the evidence presented . . . the investigative detention which occurred after the stop was supported by an objectively reasonable suspicion of illegal activity."[41] Furthermore, the court held that Caro had voluntarily consented to the search of the car.[42]

2. Tenth Circuit Decision

The first issue the Tenth Circuit addressed was whether "Trooper Avery exceeded the lawful scope of detention."[43] The court noted that based on the suspicious circumstances presented, including the discrepancy in the car's registered color and Caro's inability to identify the owner's name, Trooper Avery had reasonable suspicion which justified further questioning after the initial stop for the traffic violation.[44] However, the court stated:

> [W]here the dashboard VIN plate is readable from outside the passenger compartment, that VIN matches the VIN listed on the registration, and there are no signs the plate has been tampered with, there is insufficient cause for an officer to extend the scope of a detention

32. *Id.* at 1242-43.
33. *Id.* at 1243.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Caro*, 248 F.3d at 1243.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* (quoting district court memorandum decision and order).
42. *Id.*
43. *Caro*, 248 F.3d at 1244.
44. *Id.* at 1246.

> by entering a vehicle's passenger compartment for the purpose of further examining any VIN.[45]

Thus, the court held that "Trooper Avery's actions exceeded the permissible scope of the detention and violated Mr. Caro's Fourth Amendment rights."[46]

The next issue the Tenth Circuit considered was "whether the search [for an additional VIN] was nevertheless justified by Mr. Caro's consent."[47] The court stated that, "a search that is preceded by a Fourth Amendment violation may still be valid if the defendant's consent to that search 'was voluntary in fact under the totality of the circumstances.'"[48] The government must be able to show that there was "a sufficient attenuation or 'break in the causal connection between the illegal detention and the consent.'"[49] The court relied on factors pronounced by the Supreme Court in *Brown* as guidance in determining whether Caro's consent to search was capable of purging the taint of the impermissible stop.[50] Specifically, the court considered: 1) the lapse of time between Caro's illegal seizure and his consent; 2) whether there were any intervening circumstances; and 3) whether Trooper Avery's conduct was deliberate or flagrant.[51]

The Tenth Circuit held that based on the totality of the circumstances, Caro's consent to the search for an additional VIN was "insufficient to purge the taint of his unlawful detention."[52] First, there was no attenuation because when Trooper Avery asked for Caro's consent, he still possessed Caro's license and registration, as well as a warning citation for illegal tint.[53] Furthermore, Trooper Avery failed to instruct Caro that he could leave the scene or refuse consent.[54] Second, the *Brown* factors demonstrated that Caro's consent was not voluntary.[55] No time elapsed between Caro's illegal seizure and consent, no intervening circumstances were present, and Trooper Avery's conduct was deliberate, since he knew when he asked for consent that the dashboard VIN matched the VIN on the registration.[56] Accordingly, the court ruled that

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45. *Id.*
46. *Id.* at 1247.
47. *Id.*
48. *Id.* (quoting United States v. Fernandez, 18 F.3d 874, 881 (10th Cir. 1994)).
49. *Caro*, 248 F.3d at 1247 (quoting United States v. Gregory, 79 F.3d 973, 979 (10th Cir. 1996)).
50. *Id.*
51. *Id.*
52. *Id.* at 1248.
53. *Id.* at 1247.
54. *Id.*
55. *Caro*, 248 F.3d at 1247.
56. *Id.* at 1247-48.

any evidence derived from Trooper Avery's search for an additional VIN must be suppressed as "fruit of the poisonous tree."[57]

The final issue the Tenth Circuit addressed was whether the general search of Caro's vehicle, based on the discovery of the air fresheners during the search for an additional VIN, was justified by consent.[58] The court stated that the air fresheners discovered by Trooper Avery could not "provide a valid foundation for enlarged suspicion, as they were 'come at by the exploitation of [the] illegality.'"[59] In addition, the court believed that the same *Brown* factors that tainted the initial search for the VIN were "still present and unmitigated" when Caro consented to the general search.[60] Thus, Caro's consent did not remove the taint of the illegal stop.[61]

C. *Other Circuits*

The Eight Circuit achieved a different outcome in *United States v. McGill*.[62] In *McGill*, Officer Parker was summoned to the scene of an accident in which McGill was involved.[63] As part of the investigation, Officer Parker required the VIN numbers of the vehicles involved in the accident.[64] In order to view the VIN number of McGill's truck, Officer Parker stuck his head through the driver's side window, even though the VIN number was visible through the windshield.[65] In doing so, Officer Parker was confronted with the smell of marijuana from inside McGill's truck.[66] Upon relaying his discovery to McGill, Officer Parker asked for consent to search the truck, which was subsequently given.[67] A search of the truck uncovered "marijuana cigarettes in the ashtray and baggies of marijuana behind a loose dashboard panel plate."[68] Officer Parker arrested McGill, and a subsequent search of the truck at the police station revealed the presence of a firearm, from which the federal charges implicated in this case arose.[69]

At the trial level, McGill filed a motion to suppress the firearm, arguing that the Fourth Amendment was violated when Officer Parker stuck his head into McGill's truck to read the VIN, and that the gun was

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57. *Id.* at 1248.
58. *See id.*
59. *Id.* (quoting United States v. Shareef, 100 F.3d 1491, 1508 (10th Cir. 1996)).
60. *Id.*
61. *Caro*, 248 F.3d at 1248.
62. 125 F.3d 642, 644 (8th Cir. 1997).
63. *McGill*, 125 F.3d at 643.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *McGill*, 125 F.3d at 643.

the fruit of an illegal search.[70] The district court denied McGill's motion to suppress, finding that the "marijuana was inevitably discoverable."[71] The court stated that Officer Parker would have eventually either smelled the marijuana emanating from the truck or have checked the VIN number on the inside of the driver's door.[72]

On appeal, the Eight Circuit affirmed.[73] Without addressing the legality of the initial search,[74] the court noted that, "McGill's voluntary consent was sufficiently an act of free will, even if Parker's motive in requesting consent was supplied by an unlawful prior search."[75] In making its determination, the court relied on the factors outlined in *Brown*.[76] The court recognized that Officer Parker's request for consent took place immediately following the purported unlawful search, absent any intervening circumstances.[77] However, the court noted that McGill was aware of his right to refuse consent.[78] Furthermore, the court emphasized that the most important factor, "the nature of Officer Parker's Fourth Amendment violation," demonstrated that Officer Parker was acting appropriately in response to an automobile accident that was caused by McGill.[79] Accordingly, the circumstances demonstrated that McGill's consent was sufficient to purge the taint of the assumed illegal search by Officer Parker.[80]

D. *Analysis*

Consensual searches are the most commonly used weapon within the arsenal of law enforcement.[81] Police conducting these searches do not have to make the same outside efforts that are required by the warrant system,[82] and people are often willing to allow the police to conduct a search in order to avoid the hassle of a prolonged seizure.[83] However, the rule that the Tenth Circuit enunciated in *Caro* permits evidence that would normally be suppressed as fruit of the poisonous tree to be cleansed of its unconstitutional taint, if the consent was voluntary in fact

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70. *See id.* at 644.
71. *Id.*
72. *Id.*
73. *Id.* at 645.
74. *Id.* at 644.
75. *McGill*, 125 F.3d at 645 (internal quotations omitted).
76. *See id.* at 644.
77. *Id.*
78. *Id.*
79. *Id.* at 644 ("Ascertaining the vehicle's VIN number and determining whether McGill's driving had been impaired by drugs or alcohol were highly relevant to th[e] investigation.").
80. *Id.* at 645.
81. *See* LAFAVE, *supra* note 3, § 8.1, at 596; *see also* MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES 212 (1998)("In most jurisdictions, the police conduct far more consensual searches than those justified by probable cause or a search warrant.").
82. LAFAVE, *supra* note 3, § 8.1, at 596.
83. *See id.* at 597.

and not the product of an illegal search or seizure.[84] This rule goes one step further because consent can not only overcome the warrant and probable cause requirements of the Fourth Amendment, but can also brush aside the fruit of the poisonous tree doctrine that is imbedded in our jurisprudence.

II. SEARCHES OF HOMES PURSUANT TO AN ARREST WARRANT

A. *Background*

In *Payton v. New York*,[85] the Supreme Court adopted the stance that while a "man's house is his castle,"[86] it is "constitutionally reasonable to require him to open his doors to the officers of the law."[87] This decision allowed law enforcement officers to gain constitutional admittance to people's homes based on an arrest warrant founded on probable cause and a reasonable belief the person was home.[88] However, on the trail of this case was *Steagald v. United States*,[89] which the Supreme Court decided a year later. *Steagald* sought to protect the Fourth Amendment rights of innocent individuals from governmental intrusion by limiting the ability of law enforcement officers to search houses based on an arrest warrant for a third party guest.[90] However, as *United States v. Gay*[91] demonstrates, the Tenth Circuit has interwoven the rationales of the two tests[92] and one must now question who is a third party guest, and when is a resident susceptible to police intrusion.

B. *United States v. Gay*

1. Facts

Gay was arrested for "possession of cocaine base with intent to distribute, in violation of 21 U.S.C. § 841(a)(1)."[93] While out on bail, Gay fled, and the United States Marshal Service tried for two years to serve a Drug Enforcement Agency (DEA) arrest warrant on Gay.[94]

Subsequently, Deputy McNeil of the United States Marshal Service received information from an informant regarding the whereabouts of Gay, who was supposedly living with his uncle at the time.[95] Officers

84. *See* United States v. Caro, 248 F.3d 1240, 1247 (10th Cir. 2001).
85. 445 U.S. 573 (1980).
86. *Payton*, 445 U.S. at 596.
87. *Id.* at 602-03.
88. *Id.* at 603.
89. 451 U.S. 204 (1981).
90. *See Steagald*, 451 U.S. at 205-06.
91. 240 F.3d 1222 (10th Cir. 2001), *cert. denied*, 121 S. Ct. 2571 (2001).
92. *See Gay*, 240 F.3d at 1226.
93. *Id.* at 1224.
94. *Id.*
95. *Id.*

obtained and executed a search warrant for the uncle's residence, but Gay was not present.[96] However, an informant at the residence stated that Gay did not live at his uncle's residence.[97] Instead, the informant knew from "personal experience and numerous visits" that Gay lived at a different location two miles away.[98] The informant escorted the law enforcement officers to the location of Gay's duplex, which he pointed out, and told them Gay was presently inside.[99]

After arriving at the new residence, Deputy McNeil, accompanied by other officers, knocked on the door and announced "police."[100] After hearing a "thud" and waiting a few seconds, the police forcibly entered the residence and found Gay.[101] At Gay's feet was a gun and in plain view was crack cocaine.[102] Gay was arrested and admitted to owning the gun and drugs.[103] The district court denied Gay's motion to suppress and Gay subsequently pled guilty to drug and firearm charges.[104]

2. Tenth Circuit Decision

Gay argued that in order for the officers to have lawfully arrested him at the second residence, a search warrant was required.[105] The Tenth Circuit disagreed.[106] The court noted that under *Steagald*, when the home to be searched involves a third party, a search warrant is required "absent exigent circumstances or consent."[107] However, when there is "a reasonable belief the arrestee (1) live[s] in the residence; and (2) is within the residence at the time of entry," a *Payton* analysis is required and an arrest warrant founded on probable cause is sufficient.[108] In light of the circumstances presented, the court believed the *Payton* test was applicable.[109]

First, the Tenth Circuit considered whether it was reasonable for the officers to believe Gay lived at the second residence when the search was conducted.[110] The court noted that the officers' belief that the suspect lived in the residence was based on an objective standard, and "need not prove true in fact."[111] Furthermore, the suspect need not actually live in the residence, "so long as he 'possesses common authority over, or some

96. *Id.* at 1224-25.
97. *Id.* at 1225.
98. *Gay*, 240 F.3d at 1225.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Gay*, 240 F.3d at 1225.
105. *Id.* at 1226.
106. *Id.*
107. *Id.* (citing Steagald v. United States, 451 U.S. 204, 205-06 (1981)).
108. *Id.* (citing Valdez v. McPheters, 172 F.3d 1220, 1224-25 (10th Cir. 1999)).
109. *Id.*
110. *See Gay*, 240 F.3d at 1226-27.
111. *Id.* at 1226 (quoting *Valdez*, 172 F.3d at 1225).

other significant relationship to, the residence entered by police.'"[112] This is because "people do not live in individual, separate, hermetically-sealed residences[, but] live with other people[;] they move from one residence to another."[113] Based on the detailed information provided by the informant, the court held that the belief that Gay lived at the second residence was objectively reasonable.[114]

Second, the Tenth Circuit considered whether it was reasonable for the officers to believe Gay was inside the residence at the time of the search.[115] The court noted that the officers need not actually see the suspect because criminals often attempt to evade detection.[116] Based upon the knowledge of the informant and the fact that he "explicitly told the officers Mr. Gay was currently in his home," as well as the "thud" which was heard after knocking on the door,[117] the court held it was reasonable to believe Gay was present at the second residence when the search took place.[118]

Accordingly, after considering the "totality of the circumstances," the court held that the officers' beliefs were reasonable and that the search of the second residence was authorized by the arrest warrant.[119]

C. *Other Circuits*

In *Watts v. County of Sacramento*,[120] plaintiff Christopher Pryor and his girlfriend Binti Watts brought a civil action claim pursuant to 42 U.S.C. § 1983 after police officers mistakenly entered their home trying to execute an arrest warrant.[121] The police had received an anonymous tip informing them that Chris Burgess, a wanted murder suspect, had been seen in front of the plaintiffs' house.[122] Acting on the tip, the police assembled on Watts' house to execute an arrest warrant already issued for Burgess on charges of murder and assault.[123] After Pryor opened the door, the police recognized that he fit the general description, as well as answered to the name Chris.[124] Pryor was handcuffed and Watts and her children were placed under guard, until the police discovered that they had seized the wrong person.[125] The district court granted defendants'

112. *Id.* (quoting *Valdez*, 172 F.3d at 1225).
113. *Id.* at 1226-27(quoting *Valdez*, 172 F.3d at 1225).
114. *Id.* at 1227.
115. *See id.* at 1227-28.
116. *Gay*, 240 F.3d at 1227 (citing *Valdez*, 172 F.3d at 1226).
117. *Id.*
118. *Id.* at 1228.
119. *Id.*
120. 256 F.3d 886 (9th Cir. 2001).
121. *Watts*, 256 F.3d at 887.
122. *Id.* at 888.
123. *Id.*
124. *Id.*
125. *Id.*

motion for summary judgment on the Fourth Amendment unlawful entry claim.[126]

On appeal, however, the Ninth Circuit reversed and remanded.[127] The court stated that in order for a search based on an arrest warrant to be valid against "a co-resident of the third party, ... [the] officer must have a reasonable belief that the suspect named in the arrest warrant resides in the third party's home and that he is actually present at the time of entry into the home."[128] Based on the facts of the case, the court held that the police officers could not have established a reasonable belief that Pryor lived at the residence.[129]

D. *Analysis*

The Tenth Circuit has transformed the rationale behind *Payton* and *Steagald* with its adoption of an objective, reasonableness standard to coincide with the *Payton* test.[130] *Payton* and *Steagald* set up a simple line, if it's your house and the police have a valid arrest warrant, the government's interests in safety and crime reduction take priority over the arrestee's privacy rights.[131] However, when the subject of the arrest warrant is at the home of a third party, then the innocent third party's interests triumph over the government's.[132] By employing the standard that was used in *Gay*, whereby the court looks to see if the police possessed a "reasonable belief [that] the arrestee lived in the residence,"[133] the protection that was once afforded the innocent third party is jeopardized. While this is not a new take for the Tenth Circuit,[134] it seems to bear resemblance to a general warrant,[135] allowing law enforcement officials to search wherever a person may decide to frequent based solely on an arrest warrant. Accordingly, while the Tenth Circuit has stated that the "warrantless entry of the home is the 'chief evil against which . . . the

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126. *Id.* at 888-89.

127. *Watts*, 256 F.3d at 891.

128. *Id.* at 889-890 (citing United States v. Risse, 83 F.3d 212 (8th Cir. 1996); Perez v. Simmons, 900 F.2d 213 (9th Cir. 1990)).

129. *Id.* at 890.

130. *See* United States v. Gay, 240 F.3d 1222, 1226 (10th Cir. 2001).

131. *See* Payton v. New York, 445 U.S. 573, 602-03 (1980).

132. *See* Steagald v. United States, 451 U.S. 204, 205-06 (1981).

133. *Gay*, 240 F.3d at 1226 (10th Cir. 2001).

134. *See, e.g.*, Valdez v. McPheters, 172 F.3d 1220, 1225-26 (10th Cir. 1999). The court stated:

> [E]ntry into a residence pursuant to an arrest warrant is permitted when "the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, . . . warrant a reasonable belief that the location to be searched is the suspect's dwelling, and that the suspect is within the residence at the time of entry."

Valdez, 172 F.3d at 1225-26 (quoting United States v. Magluta, 44 F.3d 1530, 1535 (11th Cir. 1995)).

135. "[A] general warrant . . . authorize[s] the agent to search private premises, without specifying the place to search or the things to seize." MILLER & WRIGHT, *supra* note 81, at 136.

Fourth Amendment is directed,'"[136] its actions demonstrate that the court does not hold this belief inviolate if the government is allowed to gain admittance based on a minimal showing under the reasonable belief standard.

III. SEARCHES OF CLOSELY REGULATED INDUSTRY

A. *Background*

In *New York v. Burger*,[137] the Supreme Court enunciated that business owners who take part in a "closely regulated" industry have an attenuated expectation of privacy, such that warrantless searches are justifiable.[138] The Court recognized that if the government has a substantial interest in regulating an industry, the inspections further the goal of the regulation, and a statute gives notice of the inspections and limits discretion, the Fourth Amendment would not be discredited.[139] In *United States v. Vasquez-Castillo*,[140] the Tenth Circuit utilized the *Burger* test to decide whether warrantless searches of commercial carriers in New Mexico were constitutionally permissible.[141]

B. *United States v. Vasquez-Castillo*

1. Facts

Pursuant to New Mexico law,[142] "all commercial carriers entering or leaving New Mexico . . ." are required to stop at ports of entry for inspection "to determine whether the vehicles, drivers, and cargo are in compliance with state laws regarding public safety, health, and welfare."[143] If commercial carriers have a "Commercial Vehicle Safety Alliance" (CVSA) inspection sticker, they typically only undergo a brief inspection; however, if the commercial carrier does not have an inspection sticker, then the inspection will be more thorough.[144] While passing through the port of entry, Vasquez-Castillo's truck was directed to undergo the most thorough inspection, based upon several factors, including the lack of an inspection decal, non-current logbook, and irregularities regarding the bill of lading.[145]

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136. United States v. Lowe, 999 F.2d 448, 451 (10th Cir. 1993)(quoting United States v. United States Dist. Court, 407 U.S. 297, 313 (1972)).

137. 482 U.S. 691 (1987).

138. *Burger*, 482 U.S. at 691.

139. *Id.* at 702-03.

140. 258 F.3d 1207 (10th Cir. 2001).

141. *See Vasquez-Castillo*, 258 F.3d at 1210-12.

142. *See* N.M. STAT. ANN. § 65-5-1 (2001).

143. *Vasquez-Castillo*, 258 F.3d at 1209.

144. *Id.*

145. *Id.*

After the outside of the truck and trailer were inspected, the Inspector, Pacheco, decided to inspect the "blocking and bracing," to make sure the cargo was secured and did not shift while in transit.[146] Upon entering the trailer, Inspector Pacheco perceived the amount of cargo Vasquez-Castillo was carrying to be unusually small in relation to the truck size.[147] As he moved further into the trailer, Inspector Pacheco smelled raw marijuana.[148] Inspector Pacheco also noticed a space "between the inner wall and outer hull of the trailer," footprints on the trailer wall, and an "air vent in the trailer that appeared to lead to nowhere."[149] After asking Vasquez-Castillo for consent to search behind the wall, and having Vasquez-Castillo sign a consent form, Inspector Pacheco opened the wall and found "over 800 pounds of marijuana concealed in the compartment."[150] Vasquez-Castillo was subsequently arrested and his motion to suppress the evidence was denied by the district court.[151]

2. Tenth Circuit Decision

The Tenth Circuit applied the three-prong test annunciated in *Burger* to determine "whether a warrantless inspection of a closely regulated industry violates the Fourth Amendment."[152] Specifically, the test required the following:

> First, there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made. Second, the warrantless inspections must be necessary to further the regulatory scheme . . . . Finally, the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.[153]

The court determined the first prong was satisfied because New Mexico has a substantial interest in promoting safety on its highways.[154] The court also determined that the warrantless inspection was necessary to further the regulatory scheme because commercial carriers traveling on the highway move quickly in and out of the State's jurisdiction.[155] Therefore, the second prong was also met.

The third prong, requiring the inspection program to be an "adequate substitute for a warrant," provided the court with the most in-depth analysis.[156] The court noted that in order to satisfy the third prong, the

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146. *Id.* at 1209 n.2.
147. *Id.* at 1209.
148. *Id.*
149. *Vasquez-Castillo*, 258 F.3d at 1209-10.
150. *Id.* at 1210.
151. *Id.*
152. *Id.*
153. *Id.* (quoting New York v. Burger, 482 U.S. 691, 702-03 (1987)).
154. *Id.* at 1211.
155. *Vasquez-Castillo*, 258 F.3d at 1211.
156. *Id.*

New Mexico regulation must inform commercial carriers that their trucks are susceptible to inspections for specific purposes, must inform them who may undertake the inspections, and must limit the inspectors' discretion "in time, place, and scope."[157] The court determined the regulation satisfied this third prong, and that Vasquez-Castillo "could not help but be aware that his property was subject to periodic inspections undertaken for specific purposes, including inspection of the blocking and bracing."[158]

Because the New Mexico regulatory statute satisfied all three prongs, the court held that Inspector Pacheco was authorized to be within the trailer prior to his detection of the marijuana smell.[159]

The court next considered whether Inspector Pacheco had probable cause to search between the walls of the trailer.[160] Based on the "totality of the circumstances," including the smell of marijuana, the internal irregularities in the trailer, and the irregularities found by Inspector Pacheco concerning the bill of lading and log book, the court held that Inspector Pacheco had probable cause to search between the walls and that the search did not violate Vasquez-Castillo's Fourth Amendment constitutional rights.[161] In doing so, the court relied on the automobile exception to the warrant requirement, which allows for the search of an automobile based on probable cause alone, without consent or exigent circumstances.[162]

C. *Other Circuits*

In *United States v. Fort*,[163] the Fifth Circuit, in a case of first impression, adopted the stance that commercial trucking is a closely regulated industry and falls within the warrant exception annunciated by the Court in *Burger*.[164] In *Fort*, the defendant's commercial truck was randomly stopped and inspected, and a cargo of 561.2 pounds of marijuana was discovered.[165] The court concluded that the stop and search were permitted because the regulatory program satisfied the three *Burger* requirements.[166] Specifically, the court noted that: 1) Texas had an interest in protecting travelers on its roads and reducing the costs incurred by taxpayers from injuries caused by commercial vehicles;[167] 2) "warrantless

157. *Id.*
158. *Id.* at 1212 (quoting United States v. Burch, 153 F.3d 1140, 1142 (10th Cir. 2001)).
159. *Id.*
160. *Id.* at 1212-13.
161. *Vasquez-Castillo*, 258 F.3d at 1213.
162. *See id.* at 1212.
163. 248 F.3d 475 (5th Cir. 2001).
164. *Fort*, 248 F.3d at 480.
165. *Id.* at 477-78.
166. *Id.* at 480-82.
167. *Id.* at 480.

stops and inspections are necessary" to promote highway safety and because "commercial trucks pass quickly through states and . . . jurisdictions of the enforcement agencies;"[168] and 3) the Texas statute provided commercial carriers with notice that their vehicles were susceptible to search and seizure, and limited the discretion of the officers conducting the inspections.[169]

D. *Analysis*

In *Vasquez-Castillo,* the Tenth Circuit sought to apply the closely regulated industry exception outlined by the Supreme Court in *Burger* to motor carriers.[170] Unlike most exceptions the Tenth Circuit has recognized, this exception, while balancing the interests of the individual and the government, also contains a check to act as a warrant substitute.[171] Specifically, the State or agency must set up a regulation to serve as notice to those who might be affected by its actions, while at the same time limiting the scope of its own discretionary actions.[172] As such, while other exceptions might involve a reasonableness inquiry based solely on the perceptions of individuals, the *Burger* test is more codified and structured.

IV. SUSPICIONLESS SEARCHES IN SCHOOLS

A. *Background*

In *Vernonia School District 47J v. Acton,*[173] the Supreme Court held that suspicionless searches of school children may be reasonable under the Fourth Amendment if the government's interests in a school policy outweigh the students' privacy interests which are compromised by the policy.[174] The Supreme Court noted that a "search unsupported by probable cause can be constitutional . . . 'when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.'"[175] According to the Supreme Court, the public school forum qualified for the "special needs" exception to the warrant requirement because the warrant requirement would interfere with the ability of schools to maintain order and discipline.[176] In a case of first impression, the Tenth Circuit, in *Earls ex rel Earls v. Board of Edu-*

168. *Id.* at 481.
169. *Id.* at 482.
170. *See* United States v. Vasquez-Castillo, 258 F.3d 1207, 1210-12 (10th Cir. 2001).
171. *See Vasquez-Castillo,* 258 F.3d at 1211.
172. *Id.*
173. 515 U.S. 646 (1995).
174. *Vernonia Sch. Dist. 47J,* 515 U.S. at 646.
175. *Id.* at 653 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).
176. *Id.*

cation,[177] sought to apply the reasoning of the *Vernonia* Court to a drug-testing program administered by an Oklahoma high school.[178]

B. *Earls ex rel Earls v. Board of Education*

1. Facts

Students of Tecumseh High School in Oklahoma brought a civil action pursuant to 42 U.S.C. § 1983 against the Board of Education and the School District.[179] The students sought to challenge "the constitutionality of the random suspicionless urinalysis drug testing policy which the District implemented for all students participating in competitive extracurricular activities."[180] The testing policy adopted by the School District required every student who wished to participate in extracurricular activities to "sign a written consent agreeing to submit to drug testing prior to participating in the activity, randomly during the year while participating, and at any time while participating upon reasonable suspicion."[181] The testing itself was done based on a strict procedure and the information was kept confidential.[182] The testing results were only disclosed to specific school personnel who "ha[d] a need to know," and never to "any law enforcement authorities."[183] If a student did not wish to be drug tested, he/she could not participate in the school's extracurricular activities.[184] At the trial level, the district court held that the drug testing policy did not violate the Fourth Amendment.[185]

2. Tenth Circuit Decision

In considering whether the suspicionless drug testing policy adopted by the School District violated the Fourth Amendment, the Tenth Circuit was required to determine if the policy fell within the "special needs" doctrine.[186] "[U]nder the special needs doctrine, the [c]ourt identifies a special need which makes impracticable adherence to the warrant and probable cause requirements, then balances the government's interest in conducting the particular search against the individual's privacy interests upon which the search intrudes."[187] The court noted that the warrant and probable cause requirements of the Fourth Amendment would interfere

177. 242 F.3d 1264 (10th Cir. 2001).
178. *See Earls ex rel Earls*, 242 F.3d at 1264, 1270-78.
179. *Id.* at 1266.
180. *Id.*
181. *Id.* at 1267.
182. *Id.* at 1267-68.
183. *Id.* at 1268.
184. *Earls ex rel Earls*, 242 F.3d at 1268.
185. *Id.* at 1266.
186. *Id.* at 1269.
187. *Id.*

with the disciplinary needs of the School District and their ability to maintain order.[188]

The court next sought to determine the reasonableness of the search based on a balancing test of the interests of the parties involved.[189] The first factor the court considered was the "nature of the privacy interest upon which the search . . . intrudes."[190] The court initially noted that a student's expectation of privacy should not be diminished just because they voluntarily choose to participate in an activity; however, the court went on to reason that because students are required to follow rules in order to participate in extracurricular activities, either from a coach or teacher, their personal freedom is constrained to some degree.[191] Thus, participants in extracurricular activities expect less privacy than those students who choose not to participate.[192]

The second factor considered was "the character of the intrusion that is complained of."[193] The court determined the invasion of privacy to the student was minimal based on the manner in which the testing took place, the information obtained, and how the information was used.[194]

The final factor the Tenth Circuit considered was "the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it."[195] The court noted that the safety concerns raised by the School District were lacking because the policy "too often simply tests the wrong students."[196] For instance, the court stated that students who participate in choir are tested out of concern for injury, but students who participate in shop or school labs, where an injury is more perceivable, are not required to submit to the testing.[197] Furthermore, the court recognized that there did not even appear to be a "measurable drug problem" in the School District, which diminished the efficacy of the drug testing greatly.[198] The court stated, that "[s]pecial needs must rest on demonstrated realities."[199] For if a school district did not have to demonstrate a perceivable problem before acting, their ability to invade upon the rights of the students would be limitless.[200]

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188. *Id.* at 1270.

189. *Id.*

190. *Earls ex rel Earls*, 242 F.3d at 1275 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995)).

191. *Id.* at 1276.

192. *Id.*

193. *Id.* (quoting *Vernonia Sch. Dist. 47J*, 515 U.S. at 658).

194. *Id.*

195. *Id.* (quoting *Vernonia Sch. Dist. 47J*, 515 U.S. at 660).

196. *Earls ex rel Earls*, 242 F.3d at 1277.

197. *Id.*

198. *Id.*

199. *Id.* at 1278 (quoting United Teachers v. Orleans Parish Sch. Bd., 142 F.3d 853, 857 (5th Cir. 1998)).

200. *Id.*

Accordingly, based on a balancing of the three major interests concerned, the court concluded that the drug testing policy adopted by the School District was unconstitutional and violated the students' Fourth Amendment protections.[201]

C. *Other Circuits*

The Eleventh Circuit also employed the analysis presented by the Supreme Court in *Vernonia*, in determining whether suspicionless searches of school children were constitutional in light of the Fourth Amendment.[202] In *Thomas ex rel Thomas v. Roberts*, a fifth grade teacher and a police officer, on campus to do a drug prevention demonstration, conducted strip searches of students after one student's school trip money disappeared in class.[203] The students affected filed suit claiming they had been deprived of their constitutional rights, including a Fourth Amendment claim.[204] Although ruling that the strip searches were unconstitutional, the district court held that the individual defendants were shielded by qualified immunity.[205]

On appeal, the Eleventh Circuit noted that a "search may be conducted without individualized suspicion when 'the privacy interests implicated by the search are minimal, and . . . an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion.'"[206] Applying this test to the facts of the case, the court concluded that the theft of the student's money did not present a threat to the discipline or safety of the school such that students could be strip searched without individualized suspicion.[207] Accordingly, the court held that the searches were unconstitutional under the Fourth Amendment.[208]

A different result was reached by the Seventh Circuit in *Joy v. Penn-Harris-Madison School Corporation*.[209] In *Joy*, students brought suit against Penn-Harris-Madison School Corporation ("PHM"), challenging the constitutionality of a policy that provided for "random, suspicionless drug testing of students involved in extracurricular activities and of students driving to school."[210] The policy sought to test for "drugs, alcohol, and tobacco,"[211] and required students who participated in extra-

201. *Id.*
202. *See Thomas ex rel Thomas v. Roberts*, 261 F.3d 1160, 1167-69 (11th Cir. 2001).
203. *See Thomas ex rel Thomas*, 261 F.3d at 1163-64.
204. *Id.* at 1165.
205. *Id.*
206. *Id.* at 1167 (quoting Skinner v. Ry. Labor Executives' Ass'n., 489 U.S. 602, 624 (1989)).
207. *Id.* at 1169.
208. *Id.*
209. 212 F.3d 1052, 1067 (7th Cir. 2000).
210. *Joy*, 212 F.3d at 1054.
211. *Id.*

curricular activities or who received a parking permit to sign a consent form agreeing to be tested.[212] The policy outlined a strict procedure for the testing, and provided for confidentiality of the results.[213] Furthermore, a student "receiving a positive test result, [could] be subject to exclusion from any extracurricular activities and/or to revocation of parking privileges."[214] At the trial level, the district court upheld the testing of both students involved in extracurricular activities and those who drove to school.[215]

On appeal, the Seventh Circuit noted that it had addressed the issue of student drug testing in *Todd v. Rush County Schools*,[216] in which it upheld suspicionless testing of students for drugs, alcohol, and nicotine[217] without reviewing the factors enunciated in *Vernonia*.[218] Notwithstanding its decision in *Todd*, the court stated that if "we were reviewing this case based solely on *Vernonia* and *Chandler*, we would not sustain the random drug, alcohol, and nicotine testing of students seeking to participate in extracurricular activities."[219] The court subsequently undertook an analysis of PHM's testing policy based on the factors enunciated by the Supreme Court in *Vernonia*.[220]

First, the court noted that the "expectation of privacy for students in extracurricular activities . . . [was] greater than the expectation of privacy for athletes,"[221] which the Supreme Court assessed in *Vernonia*. Second, the court stated that the "character of the intrusion [wa]s not overly invasive."[222] Third, the court noted that PHM failed to demonstrate any connection between students involved in extracurricular activities and drug use, nor did it "explain[] how drug use affects students in extracurricular activities differently than students in general."[223] Fourth, the court noted that there was no indication that testing students involved in extracurricular activities would address the problem.[224] Furthermore, PHM failed to demonstrate how requiring individualized suspicion would be unfeasible.[225] Thus, based on the *Vernonia* factors, the court believed that the PHM testing policy was unconstitutional.[226] However, applying the doc-

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212. *Id.* at 1055.
213. *See id.* at 1057.
214. *Id.*
215. *See id.*
216. 133 F.3d 984 (7th Cir. 1998).
217. *See Joy*, 212 F.3d at 1061 (citing *Todd*, 133 F.3d at 986-87).
218. *Id.*
219. *Id.* at 1063.
220. *See id.* at 1063-65.
221. *Id.* at 603.
222. *Id.* at 1064.
223. *Joy*, 212 F.3d at 1064.
224. *Id.* at 1065.
225. *See id.* ("PHM has made no showing that teachers, staff and sponsors of extracurricular activities would not be able to observe the students for suspicious behavior.").
226. *Id.*

trine of *stare decisis* and its prior ruling in *Todd*, the court affirmed the district court's decision permitting testing of students involved in extracurricular activities.[227]

In addressing the suspicionless testing of student drivers, the Seventh Circuit reached a similar result, concluding that testing for drugs and alcohol was reasonable, but withholding the ability to test for nicotine.[228] In reaching this decision, however, the court relied on the analysis outlined in *Vernonia*, instead of precedent.[229] Specifically, the court recognized "a legitimate and pressing need for drug and alcohol testing of students driving vehicles on school property,"[230] because the risk imposed was substantial in nature[231] and requiring individualized suspicion was not feasible.[232] The need to test for nicotine, however, was unjustifiable[233] because there was no demonstrated risk and the policy could punish students for legal behavior.[234]

D. *Analysis*

In deciding *Earls*, the Tenth Circuit was presented with a case of first impression.[235] The court used the factors adopted by the Supreme Court in *Vernonia* as guidance in determining if the drug testing policy was reasonable by balancing the privacy interests of the high school students involved and the governmental interests in effectuating the policy.[236] Unlike the Supreme Court in *Vernonia*, however, the Tenth Circuit was faced with a negligible drug problem at Tecumseh High School[237] and was unwilling to allow suspicionless drug testing of students without a showing that the intrusion would redress the problem at hand.[238] While the Tenth Circuit was restrained in its unwillingness to allow for searches based on such a non-demonstrable showing, the "special needs" exception adopted to analyze the issue is but one more test which centers on the reasonableness of the governmental policy and pays little heed to the Fourth Amendment Warrant Clause.

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227. *Id.* at 1066.
228. *Id.* at 1065.
229. *Joy*, 212 F.3d at 1063-65.
230. *Id.* at 1064.
231. *See id.*
232. *Id.* at 1065.
233. *Id.*
234. *Id.* at 1064.
235. *See* Earls *ex rel* Earls v. Bd. of Educ., 242 F.3d 1264, 1278-79 (10th Cir. 2001).
236. *See Earls ex rel Earls*, 242 F.3d at 1275-78.
237. *See id.* at 1272-75.
238. *Id.* at 1278 ("Unless a [school] district is required to demonstrate such a problem, there is no limit on what students a school may randomly and without suspicion test. Without any limitation, schools could test all of their students simply as a condition of attending school.").

V. CONCLUSION

During the survey period, the Tenth Circuit continued to adopt new and broadening exceptions to the Fourth Amendment's warrant requirement. The Supreme Court, and the Tenth Circuit with it, "has shifted . . . from a conjunctive interpretation of the Fourth Amendment to an interpretation that is increasingly disjunctive and, for searches unrelated to criminal investigations, reliant upon the special needs balancing test to determine reasonableness."[239] While the saying that the Fourth Amendment has a preference for warrants might have once been true, the past year does not mirror that sentiment in the Tenth Circuit. At this current pace, the exceptions might soon swallow the warrant and probable cause rule, leaving the private individual to the discretion of the police and unable to rely on the impartiality and detachment of a neutral and informed magistrate.

Charles W. Chotvacs

239. Jennifer E. Smiley, *Rethinking the "Special Needs" Doctrine: Suspicionless Drug Testing of High School Students and the Narrowing of Fourth Amendment Protections*, 95 NW. U. L. REV. 811, 836 (2001) ("Under the conjunctive approach, . . . the Fourth Amendment does not permit warrantless searches and seizures, while under the disjunctive approach, warrantless searches are allowed, provided that they are 'reasonable.'").